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Summary record of the 2108th meeting

Topic:
International liability for injurious consequences arising out of acts not prohibited by international law

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2108th MEETING

Tuesday, 30 May 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFATH

Present: Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Boutros-Ghali, Mr. Calero Rodrigues, Mr. Diaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Mbandu, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. RazaFrandalambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.


[Agenda item 7]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR

ARTICLES 1 TO 17

1. The CHAIRMAN invited the Special Rapporteur to introduce his fifth report on the topic (A/CN.4/423), as well as the revised draft articles 1 to 95 and the new draft articles 10 to 17 contained therein, which read:

CHAPTER I

GENERAL PROVISIONS

Article 1. Scope of the present articles

The present articles shall apply with respect to activities carried on in the territory of a State or in other places under its jurisdiction as recognized by international law or, in the absence of such jurisdiction, under its control, when the physical consequences of such activities cause, or create an appreciable risk of causing, transboundary harm throughout the process.

Article 2. Use of terms

For the purposes of the present articles:

(a) "Risk" means the risk occasioned by the use of things whose physical properties, considered either intrinsically or in relation to the place, environment or way in which they are used, make them likely to cause transboundary harm throughout the process, notwithstanding any precautions which might be taken in their regard;

(b) "Activities involving risk" means the activities referred to in subparagraph (a), in which risk is contingent, and "activities with harmful effects" means those causing appreciable transboundary harm throughout the process;

(c) "Transboundary harm" means the effect which arises as a physical consequence of the activities referred to in article 1 and which, in the territory or in places under the jurisdiction or control of another State, is appreciably detrimental to persons or objects, to the use or enjoyment of areas or to the environment, whether or not the States concerned have a common border. Under the régime of the present articles, "transboundary harm" always refers to "appreciable harm";

(d) "State of origin" means the State in whose territory or in places under whose jurisdiction or control the activities referred to in article 1 take place;

(e) "Affected State" means the State in whose territory or under whose jurisdiction persons or objects, the use or enjoyment of areas, or the environment are or may be appreciably harmed.

Article 3. Assignment of obligations

1. The State of origin shall have the obligations established by the present articles provided that it knew or had means of knowing that an activity referred to in article 1 was being, or was about to be, carried on in its territory or in other places under its jurisdiction or control.

2. Unless there is evidence to the contrary, it shall be presumed that the State of origin has the knowledge or the means of knowing referred to in paragraph 1.

Article 4. Relationship between the present articles and other international agreements

Where States Parties to the present articles are also parties to another international agreement concerning activities referred to in article 1, in relations between such States the present articles shall apply subject to that other international agreement.

Article 5. Absence of effect upon other rules of international law

ALTERNATIVE A

The fact that the present articles do not specify circumstances in which the occurrence of transboundary harm arises from a wrongful act or omission of the State of origin shall be without prejudice to the operation of any other rule of international law.

ALTERNATIVE B

The present articles are without prejudice to the operation of any other rule of international law establishing liability for transboundary harm resulting from a wrongful act.

CHAPTER II

PRINCIPLES

Article 6. Freedom of action and the limits thereto

The sovereign freedom of States to carry on or permit human activities in their territory or in other places under their jurisdiction or control must be compatible with the protection of the rights emanating from the sovereignty of other States.

Article 7. Co-operation

States shall co-operate in good faith among themselves, and request the assistance of any international organizations that might be able

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5. Revised texts of draft articles 1 to 10 submitted by the Special Rapporteur in his fourth report (A/CN.4/413) and referred to the Drafting Committee by the Commission at its fortieth session (for the texts, see Yearbook . . . 1988, vol. II (Part Two), p. 9, para. 22).
to help them, in trying to prevent any activities referred to in article 1 carried on in their territory or in other places under their jurisdiction or control from causing transboundary harm. If such harm occurs, the State of origin shall co-operate with the affected State in minimizing its effects. In the event of harm caused by an accident, the affected State shall, if possible, also co-operate with the State of origin with regard to any harmful effects which may have arisen in the territory of the State of origin or in other places under its jurisdiction or control.

Article 8. Prevention

States of origin shall take appropriate measures to prevent or, where necessary, minimize the risk of transboundary harm. To that end they shall, in so far as they are able, use the best practicable, available means with regard to activities referred to in article 1.

Article 9. Reparation

To the extent compatible with the present articles, the State of origin shall make reparation for appreciable harm caused by an activity referred to in article 1. Such reparation shall be decided by negotiation between the State of origin and the affected State or States and shall be guided, in principle, by the criteria set forth in the present articles, bearing in mind in particular that reparation should seek to restore the balance of interests affected by the harm.

CHAPTER III
NOTIFICATION, INFORMATION AND WARNING BY THE AFFECTED STATE

Article 10. Assessment, notification and information

If a State has reason to believe that an activity referred to in article 1 is being, or is about to be, carried on in its territory or in other places under its jurisdiction or control, it shall:

(a) review that activity to assess its potential transboundary effects and, if it finds that the activity may cause, or create the risk of causing, transboundary harm, determine the nature of the harm or risk to which it gives rise;

(b) give the affected State or States timely notification of the conclusions of the aforesaid review;

(c) accompany such notification by available technical data and information in order to enable the notified States to assess the potential effects of the activity in question;

(d) inform them of the measures which it is attempting to take to comply with article 8 and, if it deems it appropriate, those which might serve as a basis for a legal regime between the parties governing such activity.

Article 11. Procedure for protecting national security or industrial secrets

If the State of origin invokes reasons of national security or the protection of industrial secrets in order not to reveal some information which it would otherwise have had to transmit to the affected State:

(a) it shall inform the affected State that it is withholding some information and shall indicate which of the two reasons mentioned above it is invoking for that purpose;

(b) if possible, it shall transmit to the affected State any information which does not affect the areas of reservation invoked, especially information on the type of risk or harm it considers foreseeable and the measures it proposes for establishing a regime to govern the activity in question.

Article 12. Warning by the presumed affected State

If a State has serious reason to believe that it is, or may be, affected by an activity referred to in article 1 and that that activity is being carried on in the territory or in other places under the jurisdiction or control of another State, it may request that State to apply the provisions of article 10. The request shall be accompanied by a documented technical explanation setting forth the reasons for such belief.

Article 13. Period for reply to notification

Obligation of the State of origin

Unless otherwise agreed, the notifying State shall allow the notified State or States a period of six months within which to study and evaluate the potential effects of the activity and to communicate their findings to it. During such period, the notifying State shall co-operate with the notified State or States by providing them, on request, with any additional data and information that is available and necessary for a better evaluation of the effects of the activity.

Article 14. Reply to notification

The State which has been notified shall communicate its findings to the notifying State as early as possible, informing the notifying State whether it accepts the measures proposed by that State and transmitting to that State any measures which it might itself propose in order to supplement or replace such proposed measures, together with a documented technical explanation setting forth the reasons for such findings.

Article 15. Absence of reply to notification

1. If, within the period referred to in article 13, the notifying State receives no communication under article 14, it may consider that the preventive measures and, where appropriate, the legal regime which it proposed at the time of the notification are acceptable for the activity in question.

2. If the notifying State did not propose any measure for the establishment of a legal regime, the regime laid down in the present articles shall apply.

Article 16. Obligation to negotiate

1. If the notifying State and the notified State or States disagree on:

(a) the nature of the activity or its effects; or

(b) the legal regime for such activity,

ALTERNATIVE A

they shall hold consultations without delay with a view to establishing the facts with certainty in the case of (a) above, and with a view to reaching agreement on the matter in question in the case of (b) above.

ALTERNATIVE B

they shall, unless otherwise agreed, establish fact-finding machinery, in accordance with the provisions laid down in the annex to the present articles, to determine the likely transboundary effects of the activity. The report of the fact-finding machinery shall be of an advisory nature and shall not be binding on the States concerned. Once the report has been completed, the States concerned shall hold consultations with a view to negotiating a suitable legal regime for the activity.

2. Such consultations and negotiations shall be conducted on the basis of the principle of good faith and the principle that each State must show reasonable regard for the rights and legitimate interests of the other State or States.

Article 17. Absence of reply to the notification under article 12

If the State notified under the provisions of article 12 does not give any reply within six months of receiving the warning, the presumed affected State may consider that the activity referred to in the notification has the characteristics attributed to it therein, in which case the activity shall be subject to the regime laid down in the present articles.

2. Mr. BARBOZA (Special Rapporteur) said that a corrigendum to his fifth report (A/CN.4/423) would be issued shortly, indicating that the word "injury" had been replaced throughout the report and the draft articles by the
word “harm”. At the previous session, the English-speaking members of the Commission had preferred the term “harm” because it conveyed a meaning free of any connotation of wrongfulness.

3. Two aspects of the present topic had not been considered up to now by the Commission but had been the object of considerable reflection on his part. They had not been dealt with in the fifth report because of lack of time and also because some of the underlying ideas required further work by him. The first aspect was the procedure and responsibility in the case of an activity involving the risk of very extended damage in which the notification and negotiation procedures would perhaps involve many countries and possibly require the intervention of an international organization. The second aspect concerned the issues relating to activities which caused or could cause harm beyond national jurisdictions, a matter of obvious interest to the international community. If either aspect were left out, the draft would be incomplete. In fact, developments such as *erga omnes* obligations, international crimes of the State, *jus cogens*, and perhaps the protection of human rights and the marine environment pointed to the existence of a kind of “public order” in the law of nations.

4. Liability for harm caused beyond national jurisdictions no doubt presented difficult problems, but it fell fully within the purview of the topic. Some of the most important and injurious consequences of activities not prohibited by international law were felt in what had been called “the commons” of mankind: the atmosphere, the climate, the marine environment beyond national jurisdictions, etc. The fact that such liability might exist towards the international community as a whole rather than towards a particular State did complicate the present task but should not deter the Commission from undertaking it. The Commission was duty-bound to make its contribution to the legal concepts that would permit the international community to cope with the overwhelming by-products of technological advances. The law on liability was an area in which little progress had been made, despite the urgent need for speedy development. As early as 1972, Principle 22 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration)6 had recommended that States should develop the law of liability. Since then, there had been numerous conventions on activities of the type concerned but not much had been done as regards the prevention or reparation of the injurious consequences of those activities, except in the area of the civil liability of the operator and a subsidiary liability of the State in certain cases.

5. His fifth report consisted of three main parts. Section I was an introduction regarding the concept of risk, the role it had played in his fourth report (A/CN.4/413) and the reasons for changing that role. Sections II and III dealt with the revised draft articles 1 to 9 which he now proposed, in the light of the observations made in the Commission and in the Sixth Committee of the General Assembly, to replace draft articles 1 to 10 as referred to the Drafting Committee at the previous session.7 Sections IV to IX dealt with the new draft articles 10 to 17 relating to procedural matters.

6. The introduction served the important purpose of explaining why he had given room in the draft to a very important and consistent current of thought which had manifested itself both in the Commission and in the Sixth Committee, namely the trend in favour of basing liability on harm and not only on risk. In the fourth report, risk had been introduced as a pivotal concept with the idea of establishing a much needed limit to the scope of the topic. Risk also played an important role in the revised articles, but not that of limiting the draft to dangerous activities. The drafting had been modified in such a way as to admit explicitly activities which caused harm “throughout the process” of their development. A limit was none the less essential, and was provided by the concept of “activities” as the sole object of the topic. That point was explained in the fifth report (A/CN.4/423, paras. 11-13). The distinction between “acts” and “activities”, already studied in previous reports (ibid., footnote 11), had important consequences. If the topic were limited to “activities”, it would not deal with liability attaching to isolated acts; as a result, not all harm produced by any act would be a matter for the present topic. Paragraph 13 of the report was important, since it sought to show that responsibility in the sense of “consequences of certain conduct” could refer only to acts, not to activities, and that, if the focus was shifted from “acts” to “activities”, the title of the topic acquired broader scope: the Commission would not be dealing only with the consequences of acts—one of the meanings of responsibility—but also with the task of determining responsibilities (obligations) as a condition for the development of activities and eventually establishing obligations of prevention in that regard. That reasoning tended to clarify any confusion which might arise from the association of concepts such as “acts” and “liability” for them, in the title of the topic, and to show that the Commission was acting within the scope of its mandate from the General Assembly even if it established obligations of prevention, the breach of which could constitute wrongfulness.

7. The revised articles of chapter I (General provisions) and chapter II (Principles) of the draft had been reduced in number from 10 to 9 as a result of the merger of previous draft articles 7 and 8. Section III of the report contained explanatory comments on each of the articles for the benefit of the Commission and, in particular, the Drafting Committee.

8. In draft article 1, the words “cause, or create an appreciable risk of causing, transboundary harm” represented an attempt to cover activities involving risk and those with harmful effects. Moreover, the idea of “appreciable risk”, which was accepted in international practice, had been retained. It should be stressed that, in activities involving risk, the “appreciable risk” mentioned must be the risk of causing “appreciable harm” in order to justify prevention being demanded. Despite the fact that the limits of appreciable risk and appreciable harm were somewhat blurred, the adjective “appreciable” had to be applied to both concepts. It had also been used to qualify the term “harm” in the draft articles on the law of the non-navigational uses of international watercourses. It was highly desirable that, in view of the similarity between the two topics, the terms used in both should be harmonized.

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7 See footnote 5 above.
9. “Transboundary harm” meant “appreciable transboundary harm”, a point that was made clear in draft article 2 (c). In his fourth report (A/CN.4/413, paras. 8-15), he had dealt with the question whether the topic included activities which caused appreciable transboundary harm by pollution, the effects of which were normally cumulative. In the fifth report (A/CN.4/423, para. 9), he drew attention to the difficulties arising from the fact that the polluting effects were foreseeable: the harm was an inevitable consequence of the activity itself. In the fourth report he had advocated the inclusion of those kinds of activities within the scope of the topic, for if activities involving risk, or contingent harm, were included then it was all the more logical that those which were bound to cause harm should be included too.

10. In draft article 2 (a) (i), the phrase “notwithstanding any precautions which might be taken in their regard” pointed to the basic characteristic of liability for risk, namely the absence of fault and the irrelevance of “due diligence”. The comments made in earlier debates that activities with a low probability of causing disastrous harm should be included were accommodated in subparagraph (a) (ii) on “appreciable risk”. Subparagraph (b) introduced the qualification “with harmful effects” for certain activities, such as polluting activities, which caused harm. It was understood that such activities were not totally harmful: they were permitted because their usefulness outweighed the harm they caused.

11. The term “places”, in subparagraph (c), replacing the term “spheres” used in the previous text, was intended to indicate that transboundary harm could affect not only a State’s territory, but also other areas where the State exercised jurisdiction as recognized by international law. For example, in the exclusive economic zone, an oil rig or a vessel of a coastal State could be damaged as a result of an activity carried on by a vessel of another State or from land or from an aircraft registered in another State. The case of a vessel of one State whose activity caused harm to the vessel of another State while both vessels were on the high seas was another instance of transboundary harm.

12. The case of a place or territory “under the control” of another State presented certain difficulties. A possible initial reaction would be to deny the status of affected State to a State which was exercising control of a territory in violation of international law. The result, however, would be to leave the inhabitants of the territory without international protection in the event of harm to their environment. Two courses were then possible. One was to accord the status of affected State to the State exercising control only in so far as it was responsible for fulfilling certain international duties towards the population, for instance protecting their human rights. Another possibility was to accord that status to the entity which had legal jurisdiction over the territory: either the State lawfully entitled to the territory or a body appointed to represent it, as in the case of the United Nations Council for Namibia. On that issue, he had not proposed any text and awaited the opinions of members of the Commission.

13. In subparagraph (e), on the meaning of the expression “affected State”, a reference to “the environment” had been added. Although it could have been considered as covered by the previous definition, the environment had become such a major concern that it must be included in the definition of harm so as to leave no room for doubt that the draft sought to protect the environment.

14. The title of draft article 3 had been changed from “Attribution” to “Assignment of obligations”, because the word “attribution” was used in part 1 of the draft articles on State responsibility8 and it was necessary to use a different term. In the articles on State responsibility, the term “attribution” was used to refer to the attribution of an act to a State. Hence, since “assignment” simply meant the “imputation” of acts, it would not be appropriate to use the term in the present topic: it was not an activity—much less an act—that was being imputed or attributed to a State, but rather certain obligations deriving from the fact that a given activity was being carried on. Paragraph 2 of article 3 provided for a presumption that a State had knowledge or means of knowing that an activity referred to in article 1 was being carried on in its territory or in places under its jurisdiction or control. The burden of proof to the contrary rested with that State.

15. The revised text of draft article 5 was perhaps less awkward and offered the possibility of an interesting discussion on the coexistence of the régime of responsibility for wrongfulness with that of causal liability. In his comments on the article (ibid., paras. 41 et seq.), he considered the case of paragraph 2 of draft article 16 [17] on pollution in the topic of the law of the non-navigational uses of international watercourses and the obligation therein was analysed as one of result, as under article 23 of part 1 of the draft articles on State responsibility. He concluded that, if the draft articles applied to States which were parties to another treaty—on the non-navigational uses of international watercourses, for example—and appreciable harm from pollution was caused to one of them through an activity in the territory or under the jurisdiction or control of another State, there were two possibilities: either the State of origin was responsible for the wrongful conduct of not having used due diligence or, if it had employed due diligence and an accident had nevertheless occurred, it was causally liable.

16. Ironically, the least harsh solution for the State of origin would perhaps be the existence of a single régime: that of causal, or strict, liability. Prevention would not then be required as a separate obligation, but would simply arise from the deterrent effect of reparation under the régime of strict liability. The conclusions stated in his report (ibid., para. 50) could well be kept in mind in that connection.

17. It was also useful to imagine what would happen if, under the present draft, obligations of due diligence were imposed, so that a breach would entail wrongfulness. That situation had been viewed in the early debates on the topic as an insurmountable obstacle to obligations of prevention. In his report (ibid., para. 49), he had repeated a line of reasoning set out in his previous reports and designed to allay that concern. If the obligation of prevention under draft article 8 was one of result, the draft articles would function in essence in the same way as two conventions, except that the two régimes—one of responsibility for wrongfulness and one of causal liability—would coexist in the same instrument (ibid., para. 48).

18. Draft article 7 sought to enunciate more specifically the obligations stemming from the principle of co-operation. The article referred to both types of activities mentioned in article 1. In the case of those involving risk, co-operation must be aimed at minimizing the risk. In the case of those with harmful effects, co-operation must be aimed at keeping those effects below the threshold of appreciable harm. The reference to international organizations in article 7 was necessary, for their main purpose was to promote co-operation among States: a number of such organizations, or their programmes, were particularly well equipped to assist States in matters within their sphere of competence. A State of origin could not be considered to have complied with its obligation to co-operate in seeking to prevent the occurrence of appreciable harm if, in a particular case in which the assistance of a given organization might have been useful, it had not requested such assistance.

19. Draft article 8 set forth the principle of prevention. The previous text (previous draft article 9) had said that States must take "all reasonable preventive measures to prevent or minimize injury . . .". The revised wording required States to take "appropriate measures to prevent or, where necessary, minimize the risk of transboundary harm". That duty was not absolute, for the article went on to say: "To that end they shall, in so far as they are able, use the best practicable, available means . . .".

20. Thus, if an activity was carried on by a State or one of its agencies or enterprises, it was the State or its enterprises that would have to take the corresponding preventive measures. If those activities were carried on by private individuals or corporations, they would have to institute the actual means of prevention and the State would have to impose and enforce the corresponding obligation under its domestic law. In that regard, account had to be taken of the special situation of developing countries, which so far had suffered most from, and contributed least to, the global pollution of the planet. It was for that reason that, in referring to the means to be used, article 8 said that States had to use them "in so far as they are able" and that such means must be "available" to those States.

21. If an approach based exclusively on strict liability were adopted, obligations of prevention would be subsumed in those of reparation. In that case, article 8 would have to be interpreted as stipulating a form of co-operation, and a breach of such obligations would not imply any right of jurisdictional protection. In that connection, he would draw attention to section 2 (8) and section 3 (4) of the schematic outline submitted by the previous Special Rapporteur, which specified that failure to take any steps required by the rules on co-operation did not "in itself give rise to any right of action".

22. Draft article 9 reproduced the content of the previous draft article 10. Although the meaning had not been altered, the reference to the fact that harm "must not affect the innocent victim alone" had been deleted, since it had been criticized as inappropriate in possibly giving the impression that the innocent victim must bear the major burden of the harm. That had not, of course, been the meaning intended; the phrase had endeavoured to convey the idea that reparation did not strictly follow the principle of resstitutio in integrum which applied in responsibility for wrongfulness. That was because harm was not, in the present case, the result of a wrongful act but the expected result of a lawful activity, the assessment of which involved complex criteria. Some explanations in that regard were given in the report (ibid., para. 70). Reparation would have to be the subject of negotiation in which all the factors involved were weighed and agreement was reached on the sum of money the State of origin was to pay to the affected State or on the measures it was to take for the latter's benefit. Reparation should seek to restore the balance of interests affected by the harm, since harm in the present topic could be defined as a certain effect which, being detrimental to the affected State, upset the balance of interests involved in the activity which caused it. Accordingly, reparation, without necessarily being equivalent to all the harm considered in isolation in each case, must be such as to restore the balance of interests involved.

23. The new articles 10 to 17 of chapter III of the draft (Notification, information and warning by the affected State) related to procedural matters. Draft articles 10 to 12 dealt with the first stage of the procedure for the prevention of harmful effects and the formulation of a regime for the activities referred to in article 1, including the protection of national security or industrial secrets. Draft articles 13 to 17 dealt with the steps following notification by the State of origin of the existence of an activity referred to in article 1.

24. The general comments on articles 10 to 12 contained in section V of the report indicated the legal grounds for the obligation of the State of origin to notify States which might be affected that such an activity was being, or was about to be, carried on in its territory or in other places under its jurisdiction or control. Notification was inseparable from the other obligations laid down in article 10. Indeed, the three functions of assessment, notification and information were interlinked. For example, a State could not be notified of potential risk unless the State of origin had first made an assessment of the possible effects in other jurisdictions of the activity in question. Nor could information be supplied about the activity unless the affected State was also warned of the dangers involved.

25. The three obligations set out in draft article 10 derived, first, from the general duty to co-operate, and secondly, from the duty of States to refrain from knowingly permitting their territory to be used for acts contrary to the rights of other States. Regarding the first duty, in some cases joint action was needed by both States—the State of origin and the affected State—if prevention was to be effective. The affected State might be able to prevent transmission to its own territory of the harmful effects by taking certain measures itself; or the exchange of information might enable the harmful effects to be warded off if the affected State possessed appropriate technology for the problem. The participation of the affected State was therefore necessary if prevention was to succeed, and the State of origin was likewise bound to agree to such participation.

26. The second duty was expressed in a general rule deriving from international case-law. In the Trail Smelter case, it had been stated by the arbitral tribunal in the following terms: "no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes
in or to the territory of another or the properties or persons therein". In the *Corfu Channel* case, it had been stated by the ICJ in more general terms as "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States".

27. Under draft article 10, the State of origin had, first, to assess the potential effects of the activity (subpara. (a)), secondly, to notify the affected State if the assessment indicated harmful transboundary effects or risk (subpara. (b)), and thirdly, to transmit the available technical information so that the affected State could arrive at its own conclusions as to the potential effects of the activity (subpara. (c)). Subparagraph (d) required the State of origin also to inform the affected State of any unilateral measures of prevention it intended to take, which was a sort of first step towards a legal régime to regulate the activity in question. If no reply to the notification was received within six months (art. 13), the proposed preventive measures would be deemed acceptable.

28. Draft article 11 dealt with the procedure for protecting national security interests or industrial secrets. Provision had to be made for cases in which transmitting all its information to the affected State would create a situation detrimental to the State of origin. There was a balance of interests involved. It did not seem fair to compel a State to divulge to its competitors industrial processes which might have cost a great deal to acquire; moreover, national security might dictate that some information should be withheld. How far should legal protection be afforded to such interests? Only up to the point at which defending those interests would harm third States. If it did, the balance must be restored. Moreover, the duty of the State of origin to provide the affected State with any information not touching upon those interests must be maintained. Where harm was presumably attributable to an activity but the causes were difficult to trace owing to lack of information, the affected State should be allowed to draw on presumptions and circumstantial evidence to show that the harm was indeed caused by the activity in question. As he pointed out in his report (A/CN.4/423, para. 105), in the *Corfu Channel* case the affected State had been allowed to use such procedural devices to demonstrate that the State of origin had known what was taking place in its territory. He hoped members would give their views on the advisability of making some express provision along those lines.

29. Draft article 12 contained provisions to complement those of draft article 10. A State might have failed to realize that an activity harmful to it was being carried on in another State. Moreover, the State of origin might have underestimated the potential effects of the activity. If a State became aware that the effects might prove harmful, it had the right to alert the State of origin on the basis of a detailed technical explanation. Consequently, under article 12, the affected State could request the State of origin to comply with its obligations under article 10.

30. Draft articles 13 to 17 completed the procedural steps following notification. Two important questions arose. First, should the State of origin postpone starting an activity until satisfactory agreement had been reached with the affected State or States? Secondly, what about activities which had already been carried on for some time, such as the production of certain types of industrial wastes, the use of certain fertilizers in agriculture, emissions from car and lorry exhausts, or the use of domestic heating materials—activities which had harmful effects but had previously been tolerated?

31. On the first question, he had opted for the non-postponement of the activity. That solution was the opposite of the one adopted in the draft articles on the law of the non-navigational uses of international watercourses. But the range of activities involving watercourses was not infinite, and such activities were well defined. A riparian State could accept certain restrictions without undue impairment to its freedom of action on its own territory. By contrast, the activities covered by the present topic were changing and complex, with transboundary effects that could extend to the population of the State of origin. Accordingly, the proposed articles represented an interim régime under which the State of origin could begin or continue the activity without waiting for the consent of the affected State, but must immediately assume responsibility for any harm it might cause. If the activity proved to be dangerous or to have harmful effects, the articles provided a protective net, namely compensation for any harm if, on investigation, a causal link was established between the harm and the activity.

32. On the second question—existing harmful activities—he attributed the measure of tolerance they enjoyed to the fact that all States were affected and to the difficulty of ascertaining the precise origin of cumulative harm. Yet most such activities were regularly reviewed and were the subject of international negotiations to mitigate and ultimately remove their harmful effects. In the mean time, the draft articles offered a transitional solution by stipulating the duty to negotiate an appropriate régime for harmful activities and to negotiate reparation for harm caused. Later, the Commission might decide to amend the procedure in order to cover habitual existing activities. The negotiations must take due account of the special situation of the developing countries, which had so far contributed least to the harmful activities but had suffered most from their consequences.

33. Draft articles 13, 14 and 15 dealt with notifications and replies to notifications. Article 13 was based, *mutatis mutandis*, on articles 13 and 14 of the draft articles on the law of the non-navigational uses of international watercourses provisionally adopted by the Commission at its previous session. He had stipulated a time-limit of six months for replies so as to afford both notifying and notified States the advantage of certainty. The expression "Unless otherwise agreed" meant that States were free, in each case, to decide on an alternative time-limit. Under draft article 13, the State of origin was bound to respond to a request by the notified State for any information it possessed on the new activity, and to supplement it with any other "available" information necessary for evaluating the effects of the activity.

34. Draft article 14 concerned the notified State's reply, especially its obligation to communicate to the notifying...
State any findings of its own, and its acceptance or rejection of the preventive measures or legal régime proposed by the State of origin. Under draft article 15, silence on any of those points implied acceptance.

35. Draft article 16 provided that, if the two parties failed to agree, they were bound to negotiate a solution. The inclusion in the draft of the obligation to negotiate in such an event was merely a codification of the existing international law in the matter. The obligation was applicable to any situation where there was a clash of interests, and especially so where injurious consequences arose out of acts not prohibited by international law. In the Fisheries Jurisdiction cases, the ICJ had found that the rights of the parties were limited by their obligation to take account of the rights of other States, and accordingly that “the obligation to negotiate . . . flows from the very nature of the respective rights of the Parties; to direct them to negotiate is therefore a proper exercise of the judicial function in this case”.12 The principle thus stated was directly applicable to the situations covered by the new draft articles. The obligation to negotiate stemmed from the very nature of the respective rights of the parties on the basis of their territorial sovereignty: the right of the State of origin freely to use its own territory, and the right of the affected State to use and enjoy its territory without impairment. In the past, transboundary harm had been a rare occurrence, and regulation unnecessary. It was when scientific progress ushered in techniques with the potential to cause transboundary harm that a situation of interdependence arose, resulting in the need for certain restrictions on the rights of all States, whether for the sake of conservation or for other reasons.

36. With regard to paragraph 2 of article 16, he suggested that the limits of the obligation to negotiate lay in good faith and reasonableness. The duty to negotiate could arise only where the conflicting interests to be reconciled were essentially reasonable. Disagreement might arise between the State of origin and the affected State about the nature of the activity or its effects, or about the measures proposed for the legal régime to govern it. In the first case, paragraph 1 offered the alternatives of consultations between the parties in order to ascertain the facts, or the agreed establishment of fact-finding machinery with advisory functions. The latter solution had been suggested by the previous Special Rapporteur in the schematic outline (sect. 2 (6)). However, there was no alternative to negotiations where the disagreement related to the legal régime to govern the activity. That second procedural step was largely dependent on the outcome of the first. For that reason, fact-finding machinery was preferable.

37. Draft article 17 covered the situation in which a State notified under article 12 failed to reply within six months. It would then be deemed to have accepted the presumed affected State’s characterization of the activity, and the activity would accordingly be subject to the régime laid down in the draft articles.

38. He looked to members of the Commission for guidance on the various points covered by the draft.

39. The CHAIRMAN suggested that some corrections were required to the Special Rapporteur’s fifth report (A/CN.4/423). As the Special Rapporteur had indicated, a corrigendum would be issued shortly. In paragraph 50 (d), for example, the words “the act would not have to cease” should read “the activity would not have to cease”.

40. Mr. CALERO RODRIGUES said that the original Spanish text of the report and the French translation were preferable to the English version in several places, notably in draft article 2 (d).

41. Mr. KOROMA was critical of the wording of draft article 1. He invited the Special Rapporteur to look into the English text of the draft articles and to issue a corrigendum, for the benefit of members who relied on that version.

42. Mr. REUTER said that, since the texts proposed by the Special Rapporteur included revised articles 1 to 9 to replace articles 1 to 10 already before the Drafting Committee, it might be better for the Commission to proceed with the new draft articles 10 to 17 only. Otherwise, it might simply repeat arguments which had been rehearsed before.

43. Mr. BARBOZA (Special Rapporteur) said that he would welcome comments on all the new draft articles, but would not object to the discussion beginning with articles 10 to 17.

44. Mr. THIAM said he thought that the revised draft articles 1 to 9 should be submitted to the Drafting Committee rather than to the Commission in plenary.

45. The CHAIRMAN suggested that it would be valuable for the Drafting Committee to learn the views of members of the Commission on the revised articles 1 to 9. Members should therefore be free to comment on those texts.

46. Mr. BARSEGOV said he felt that, where major conceptual alterations had been made to a set of draft articles already before the Drafting Committee, it would be a mistake for the Commission to proceed without itself discussing the changes.

47. Mr. BEESLEY said that he agreed with Mr. Barsegov. When dealing with the draft Code of Crimes against the Peace and Security of Mankind, the Commission had originally had before it a set of draft articles containing a list of crimes, which was subsequently removed and replaced by another. Such changes being of a conceptual nature, members should be free to express their views on the earlier draft articles together with the new ones.

48. The CHAIRMAN suggested that the discussion should begin by focusing on the new draft articles 10 to 17, but should not exclude comments on the revised articles 1 to 9.

It was so agreed.

The meeting rose at 11.25 a.m.

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